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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTRIX OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Petitioner,

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ATLANTIC COAST LINE RAILROAD COMPANY.

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Opinions Below.

The District Court handed down no written opinion. Its order is found on page 66 of the Record. The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 420, and is found on pages 69, et seq., of the Record. The judgment of the Circuit Court is found on page 77 of the Record.

Questions Involved.

Two questions are involved:

(1) Did the death of petitioner's decedent result in whole or in part from the negligence of any of respondent's officers, agents or employees?

(2) If the foregoing question be answered in the negative, does the amendment of August 11, 1939, to the Federal Employers' Liability Act render respondent liable in damages for that death?

Statement of the Case.

The facts are correctly summarized in the opinion of the Circuit Court of Appeals (R. 69). Many of the facts are accurately stated in the petition, but others are inaccurately stated and certain essential facts are omitted. In order that the Court may have the page references to the Record, we call attention to inaccurately stated and omitted facts.

The deceased was last seen before the accident by Switchman Wamack in Byrd Street Yard, in Richmond, about 6:15 p. m. (R. 34) just before the cut of cars from Byrd Street Yard left for Clopton Yard. He was next seen at 7:15 p. m. when he was found caught up between the brake-shoe and hanger (R. 23, 35, 67) of the lead car in the back-up movement into slow siding made by Train 209, which had stopped at Clopton Road in Clopton Yard, Chesterfield County, Virginia. No witness saw him in the interval and no witness saw him in Clopton Yard until after the accident. Accordingly, no witness was able to testify concerning the circumstances of the accident.

It was the duty of Mr. Tiller to see that the cars were sealed (R. 15). It is correctly stated in the petition (p. 4) that in performing this duty he followed no routine. The evidence, however, does not justify the statements made by petitioner that "he usually stood somewhere near Clopton Road Crossing to check the seals on cars as they passed southwardly on the southbound main line" (p. 4); and "he usually stood at or near the point where he was on this occasion" (p. 5). The evidence shows that from

time to time, on other occasions, he had been seen doing his work "at various places" in Clopton Yard (R. 26); near the point where Clopton Road crosses the tracks (R. 26); north of Clopton Road (R. 25-26); in the yard south of Clopton Road (R. 35). Amid the witnesses there was only one witness, i. e. Switchman Wamack, who, through the years, had worked repeatedly in and out of Clopton Yard. He said: "I have seen Mr. Tiller all over the yard, from one end to the other". "I have seen him all over the yard—in other words, from the lower end of Clopton Yard all the way to Byrd Street Station" (R. 35).

On page 5 of the petition, it is said that Sergeant Tiller "was standing to the east of the back-up movement and facing eastwardly", and reference is made to Record pages 21, 29, 30 and 64. The Record does not support this statement. No one knows whether Mr. Tiller was standing at or near slow siding, or whether he was struck as he swung off the cut of cars from Byrd Street, or whether he slipped from that cut of cars and fell; and if he were standing on or close to slow siding, no one knows which way he was facing. It is significant that three witnesses, to-wit, Brakeman Dickens (R. 48), Fireman Wright (R. 59) and Switchman Wamack (R. 42-43) were in a position to have seen the reflection of the deceased's flashlight, had he been flashing his light on the seals of cars as they passed at or near this point. No one of them saw any such indication (R. 53, 58-59, 43). The first indication that anyone had been there was when Fireman Wright saw a burning flashlight lying on the ground (R. 22, 56, 57), and upon investigation by Engineer Myrick and himself, the light, the cap, the pistol and the deceased were found (R. 22, 57).

On page 5 of the petition, it is said that "the engineer, fireman and brakeman all testified that they had never before made or seen a back-up movement northwardly on slow siding," and reference is made to Record pages 24, 49 and

58 in support of this statement. It is later argued in petitioner's brief (p. 18) that the back-up movement into slow siding was therefore an unusual movement.

The engineer (R. 24) states that he had never made this movement before. The brakeman testified (R. 49) that he had never before been in slow siding. The fireman testified (R. 58) that he had never made this back-up movement before, but had always gotten "in the clear on the south side".

Further, the engineer stated that prior to the death of Mr. Tiller, months would go by during which he (the engineer) was not in Clopton Yard (R. 28), and that for a couple of years prior to Mr. Tiller's death he (the engineer) was in the yard perhaps two or three times a month (R. 28). At the time of Mr. Tiller's death, the fireman had been working for respondent for about three years, and during that time he had been in Clopton Yard not more than twelve or fifteen times (R. 58). The brakeman had been employed for approximately three and one-half years, and had been in Clopton Yard only a dozen or twenty times (R. 51). These three witnesses, accordingly, knew little of what ordinarily took place in Clopton Yard. But there were two of petitioner's witnesses who had been in the yard on many occasions. Switchman Wamack had been assigned to the make-up of this particular freight train off and on from 1921, and during the two or three years prior to Mr. Tiller's death, he had been assigned to that work at least half the time (R. 37). He testified that the back-up movement into slow siding was in no sense "unusual" (R. 37), but that it might be made ten to fifteen times in one month, and again it might not be made for a considerable period of time (R. 38). Sergeant Angle, a police officer assigned to the same class of duties as Mr. Tiller, had once been on this run regularly and thereafter, from time to time, had ridden this particular freight train with Sergeant

Tiller. He testified that he had seen such back-up movements made (R. 50).

It is stated on page 3 of the petition that the back-up movement into slow siding was necessary because an error in classifying cars was made at the Byrd Street Station. This statement is not sustained by the testimony. It is true that a car in the cut of cars from Byrd Street Station had to be shifted to a different position, i. e., classified. But, the evidence shows that Clopton Yard is a "classification" yard maintained in part for the purpose of "classifying" freight cars (R. 29, 40, 51, 52), and is used regularly each evening for the purpose of making up two freight trains from the South, one a through freight train, the other a local freight train. Cars from north of Richmond are assembled in Acca Yard north of Richmond and are brought by a road engine and crew to Clopton Yard (R. 7). Richmond cars for both the through freight and the local freight are assembled in the Byrd Street Yard in the City of Richmond, and are carried by a yard engine to Clopton Yard (R. 30). When these two cuts of cars reach Clopton Yard, the through freight is then assembled (R. 30) with cars for Weldon, North Carolina, immediately behind the engine, cars for Petersburg, Virginia, in the middle, and cars for Rocky Mount, North Carolina, and points south of Rocky Mount at the end (R. 42), and the road engine and crew takes this through freight train south. As the cut from north of Richmond and the cut from Richmond must be consolidated, in part, into the through freight train and, in part, into the local freight train which leaves later, classification in Clopton Yard, not only of this particular train, but of other trains, is a normal and natural thing, and in doing this work, cars, of necessity, must be shifted back and forth (R. 29, 40, 51, 52); and in doing this work, one set of tracks will be used at one time, and another at another, as convenience may dictate (R. 43).

The distance from the center of the track on slow siding to the center of the track on southbound main line is 13 feet, which is the standard distance (R. 46). When hopper cars are on one track and ordinary cars are on the other track, the clearance between the sides of the cars is 3 feet 7½ inches (R. 45), and when hopper cars are on both tracks, the clearance is 3 feet 3½ inches (R. 45). The overhang of a hopper car is thus 4 inches more than the overhang of an ordinary car.

ARGUMENT.

Summary of Argument.

1. There was no negligence upon the part of respondent which resulted in the death of the deceased, and the District Court properly sustained the motion to direct a verdict.

2. Congress, by the 1939 Amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier and did not impose any new or higher duties on it.

I.

There was no negligence upon the part of respondent which resulted in the death of the deceased and the District Court properly allowed the motion to direct a verdict.

The alleged grounds of negligence are set forth in paragraph 4 of the complaint (R. 2) and are seven in number, to-wit: (1) failure to keep a proper lookout; (2) failure to give proper signals of the approach of the cars; (3) failure to keep the head car properly lighted; (4) failure to warn deceased of an unprecedented and unexpected change in the manner of shifting the cars; (5) failure to operate the train, engine and cars in a careful and prudent manner under the existing circumstances; (6) failure to furnish

deceased with a reasonably safe place to work; (7) failure to furnish prompt medical attention to the deceased. The petitioner abandons the seventh ground.

The fourth allegation, to-wit, an unprecedented movement, is the subject of a special section of petitioner's brief, beginning on page 17. The other five grounds are grouped together by her beginning on page 15 of her brief, and the specific acts on which negligence is predicated are that the backup movement into slow siding was made (1) without lights; (2) without a lookout; (3) without adequate warning; (4) in an unlighted railroad yard, (5) the tracks of which were located too closely together.

Since petitioner primarily predicates her allegation of negligence upon the alleged unusual movement, to-wit, a back-up movement into slow siding, we shall deal first with that point. We concede the rule implied in *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, and implied and set forth in other cases, to the effect that if an employee in a classification yard is exposed to some unusual danger by reason of an unusual movement of trains or a departure from a general practice followed in the yard, and if the employer gives him no warning thereof, the employer is guilty of negligence. It is not necessary to restate the evidence heretofore briefly summarized. It is sufficient to state that the rule has no application to the instant case, because the evidence shows (and all the evidence was the evidence of petitioner and her witnesses) that there was no unusual movement or departure from a practice generally followed.

We group together the allegations concerning lights, lookout and warning. No one of those allegations is supported by the evidence.

Brakeman Dickens rode on the lead car of the back-up movement, holding to the ladder on the west side of it at the extreme lead or north end of the car. He had a lighted lantern in his hand and was waving it in a horizontal circu-

lar motion (R. 48). He alighted about the middle of Clopton Road (R. 49) within a few feet of the point where petitioner's decedent was struck. While he was riding the car, and when he stepped off of the car on to Clopton Road, he was facing north (R. 54). Thus, there was a light on the lead end of the back-up movement and a lookout was there.

We do not mean to say that Dickens rode the head end of this movement with his lantern for the purpose of maintaining a specific lookout for some workman, or to warn the workman. But, the evidence shows that he was there and the light was there for any person to see.

The evidence shows conclusively that the automatic bell on the engine propelling the back-up movement was ringing during the whole of that movement (R. 30, 59). An adequate warning was therefore given.

The allegations concerning lights, lookout and warning are thus not supported by the evidence, but even if they did find support in the testimony of petitioner's witnesses, a verdict should still have been directed, because a railroad company does not owe to its employees working in a classification yard the duty of maintaining lights, providing lookouts and giving warning of the movement of trains back and forth. Time after time this Court and the lower federal courts have so held—see *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *C. & O. Ry. Co.* v. *Nixon*, 271 U. S. 218; *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165; *Delaware Etc. R. R. Co.* v. *Koske*, 279 U. S. 7; *Fernand* v. *Boston & M. R. R.*, 2 Cir., 62 F. (2d) 782; *Connelly* v. *Pennsylvania R. Co.*, 3 Cir., 201 Fed. 54; *Southern Ry. Co.* v. *Verelle*, 4 Cir., 57 F. (2d) 1008; *N. & W. R. Co.* v. *Collingsworth*, 6 Cir., 32 F. (2d) 561.

Finally, we deal with the allegation that petitioner's decedent was not furnished a reasonably safe place to work, and with the specific points urged in support thereof,

namely, that Clopton Yard is not lighted and that the space between the tracks is too narrow.

It is true that Clopton Yard is an unlighted yard, and it is true that every classification yard is a place of inherent danger, made so, of necessity, by the character of work which must there be done. But there is not a line of evidence tending to show that Clopton Yard is any more dangerous than any other classification yard, and common observation tells us that few such yards are lighted. This Court has held that a railroad company owes no duty to employees working in a classification yard to light that yard. In *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, the injured employee was working in an unlighted yard, but it was found as a matter of law that the railroad company was guilty of no act of negligence.

As heretofore pointed out, the clearance between the southbound main line track and slow siding is the regular standard clearance (R. 46), and when hopper cars are on slow siding and other cars are on southbound main line, the clearance between the sides of the cars is 3 feet, 7½ inches (R. 45). The spacing of tracks and other engineering questions of that character are matters of which carriers have a large freedom of choice, and the "courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries". *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 170. See also *Randall* v. *B. & O. Ry. Co.*, 109 U. S. 478; *Tuttle* v. *Detroit Etc. R. Co.*, 122 U. S. 189; *B. & O. Rwy. Co.* v. *Groeger*, 266 U. S. 221; *Delaware Etc. R. R. Co.* v. *Koske*, 279 U. S. 7. It might also be pointed out that in the *Toledo* case the clearance was 2 feet, 9 inches, without considering grab irons. This court held in the *Toledo* case that the clearance therein questioned raised no inference of negligence.

It will have been noted that the testimony in the instant case fails to show how the decedent met his death, and that petitioner's hypothesis is supported by little, if anything, except the place where the body, the cap, the pistol and the flashlight were found. In the quite similar case of *Kansas City Southern Rwy. Co. v. Jones*, 276 U. S. 303, the Court said that the hypothesis there was supported "by little, if anything, except the place where the body and the lantern of the deceased were found". Mr. Justice Holmes, who delivered the opinion in that case, stated the facts as follows:

> "This is an action under the Employers' Liability Act for the death of one R. D. Ferguson who was a car inspector on the petitioner's road. No one saw the death, but only the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little, if anything, except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before 7 in the evening, so far as time can be fixed. The train passed at five minutes after 7, the time at which it was known by him to be due. His body was found at twenty-five minutes after 7. He was an experienced man."

This Court held upon those facts that there could be no recovery, and it stated:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negli-

gence of the petitioner rather than to that of the man himself."

We respectfully submit, therefore, that the evidence in the instant case fails to prove any act of negligence on behalf of respondent.

II.

Congress, by the 1939 Amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier and did not impose any new or higher duties upon it.

The Employers' Liability Act of 1908 provides that every common carrier by railroad while engaging in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, (1) for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or (2) by reason of any defect or insufficiency, due to *its negligence*, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The Act was amended by Public No. 382, 76th Congress, Chapter 685, 1st Session, S. 1708, being an Act approved August 11, 1939, to Amend the Federal Employers' Liability Act. The pertinent part of this Act in reference to any amendment to the doctrine of assumption of risk, is Section 4, which reads as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier; and no em-

> ployee shall be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (Italics ours.)

It will be noted that the only part of this amendment which has reference to this case is as follows:

> "• • • such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier." (Italics ours.)

It will be observed that the two clauses in the original Act relate solely to the carriers' *negligence*, and it will also be observed that the Amendment of 1939 regarding the question of assumption of risk also refers to "the *negligence* of the officers, agents, or employees of such carrier". (Italics ours.)

It will, therefore, be seen that Congress, by this language, *limited* the withdrawal of the defense of assumption of risk to matters which involved *only* the *negligence* of the officers, agents, or employees of such carriers, and the Court cannot imply to this language an intention upon the part of Congress to *extend* this language to the doctrine of assumption of risk upon the part of employees when *no* negligence of the carrier is proven.

Nowhere in this Amendment can be found any language showing an intent by Congress to *impose any greater duties* or *new standards* of conduct in the operation of railroads upon carriers. The language of the Amendment is language *limiting* the defense of assumption of risk; that language does *not impose*, as argued in petitioner's brief (p. 13), any *new* or *higher duties* upon carriers. As said by the Circuit Court of Appeals in its opinion, 128 F. (2d) 424, (R. 76):

"The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of the assumption of the risk must be given its accustomed weight. *It is beyond the power of this court to deny the defense in this case.* It presents no material difference of fact from situations considered by the courts in numerous decisions and held to be free from negligence on the part of the carriers, *and we have no authority to prescribe new standards of conduct* in the important field of railroad operations. See *Delaware, etc., R. Co. v. Koske*, 279 U. S. 7, 11, 49 S. Ct. 202, 73 L. Ed. 578; *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 170, 48 S. Ct. 215, 72 L. Ed. 513." (Italics ours.)

Congress has never set up a standard by which carriers must construct their yards. The carriers have freedom of choice in providing facilities and places for use of their employees, and the courts have not as yet prescribed the space to be maintained between tracks in switching yards. This is an engineering problem which the courts have left to the sound judgment of the carriers.

Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 169.

The Court says, page 169:

"The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against

the defendant. *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, ante, 351, 48 Sup. Ct. Rep. 177. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant *an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Detroit G. H. & M. R. Co.*, 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; *Randall* v. *B. & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri P. R. Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury." (Italics ours.)

Again, the Court says, page 171:

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz* v. *Humphreys, supra.*"

It is clear, therefore, that petitioner's view that the amendment enlarges the duties of carriers is altogether erroneous. All the amendment does is to deprive carriers of a defense theretofore available to them in certain cases in which they were negligent. The facts, and the decision of the Court in the *Allen* and other like cases, show that this Court had, prior to the Amendment of 1939, construed the doctrine of assumption of risk to apply to two classes of cases, to-wit: (1) to a case in which the carrier was negligent, and the employee was aware, or should have been aware thereof and the risk arising therefrom; and (2) cases in which the carrier was not negligent, but the employment was necessarily fraught with danger.

It is presumed that Congress was well informed of this fact when this amendment was brought before it.

In the case of *Seaboard Air Line* v. *Horton*, 233 U. S. 493, 504, the court, after discussing the doctrine of contributory negligence, says:

> "On the other hand, the assumption of risk, even though the risk be obvious, *may be free from any suggestion of fault or negligence on the part of the employee.* The risks may be present, nothwithstanding the existence of all reasonable care on his part. Some employments are *necessarily* fraught with danger to the workmen—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." (Italics ours.)

This was the law as laid down by the court, therefore, in 1939 when this amendment was passed.

The amendment dealt with the question of the carriers' negligence, and eliminated the defense in a case of negligence. It did not attempt to deal with the case of no negligence.

The history of the amendment is as follows:

On March 13, 1939, there was introduced into the 76th Congress, 1st Session, H. R. 4988, by Mr. Healy, "A Bill to Amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases', approved April 22, 1908, (U. S. C., title 45, sec. 51)". This bill provided that every common carrier by railroad while engaging in commerce between the States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, etc.,

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case *where said employee has not had actual notice of any negligently maintained condition or practice* where the negligence of such common carrier, its officers, agents, or employees, proximately contributed to the injury or death of such employee except those risks incident to the employment."

On the same date, in the Senate, Senate Bill 1708 was introduced by Senator Neely, providing for liability for damages in such cases, Section 1 of which provided:

> "* * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its

cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier any portion of whose duties as such employee shall be the furtherance of or in any way affecting interstate or foreign commerce as above set forth, or whose duties as such employee shall be in any degree incidental thereto, shall be considered, for the purposes of this chapter, as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

And Section 4 of the Bill provided:

"SEC. 54. ASSUMPTION OF RISKS OF EMPLOYMENT.—In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

On July 18, 1939, Mr. Walter, from the Committee on the Judiciary of the House, submitted a report to accompany H. R. 4988, which was the House Bill, in which the House Committee suggested certain changes. In this report the Committee says:

"However, the provisions of the Bill do not abolish the defense (assumption of risk) but only modifies it in certain particulars."

Further in the report, the Committee says:

"All that is sought to be done is to prevent the employer from casting the burden upon the employee, with respect to a negligently maintained condition

through devices and methods described. In all other respects the doctrine of assumption of risk still persists."

The Senate Bill was referred to the Committee on the Judiciary, and Mr. Neely, on June 22, 1939, submitted report to the Senate to accompany S. 1708. In that report the Committee says:

"It is the aim of the bill to amend the Employers' Liability Act in three particulars:

"1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.

"2. It abrogates the defense of assumption of risk in cases where *injury or death is caused by the negligence of a carrier* and makes the *doctrine of comparative negligence applicable instead.*" (Italics ours.)

In commenting on the amendment to Section 4, the Committee says, on page 3 of the report:

"Under Section 4 of this chapter, as it now reads, no compensation can be obtained for any injury to an employee or for an employee's death caused by unsafe or dangerous conditions, which resulted from the *negligence* of the employer, his agents, or servants if the court finds, in the circumstances, that the employee knew, or should have known, of the danger involved." (Italics ours.)

In Conference Report No. 1463, 76th Congress, 1st Session, to accompany S. 1708, Mr. Celler, Chairman of Managers on the part of the House, among other things, advises as follows:

"The Senate bill provided that in actions brought under the Employers' Liability Act, employees shall not be held to have assumed the risks of their employment where injury or death results in whole or in part

from the *negligence* of the carrier. The House amendment limited this provision to cases where the employee had not had actual notice of a *negligently* maintained condition or practice. The conferees agreed to the provisions of the Senate bill." (Italics ours.)

These reports clearly demonstrate the fact that both branches of Congress were advertent to the fact that the bill changed the doctrine of assumption of risk only where the carrier was *negligent* through its officers, agents, or employees.

At common law the doctrine of assumption of risk by an employee was applied without regard to negligence either on his part or the part of the employer. At common law a master was not responsible to his servants for injuries not arising from his neglect, but which were inherent in the nature of the business. The employee assumed the risk of these dangers and assumed such risk when he had knowledge that his safety was in danger by some neglect on the part of his employer of which he had knowledge and continued to work without complaint to his employer and without the promise on the part of his employer to repair or remedy such danger. It was shown in the reports of Congress that in the case of *Hall* v. *Pennsylvania R. Co.*, 6 C. C. A., 30 F. (2d) 594, plaintiff was denied recovery and was held to have assumed the risk of his employer's negligence in failing to furnish a safety belt, although he had demanded it and afterwards proceeded to go to work without a belt only when threatened with discharge. The report referred to this case as being harsh and it was this class of dangers which Congress was endeavoring to eliminate. Its purpose was to enlarge employees' protection by providing that in all cases where the injuries resulted from the *negligence* of the employer, or his fellow servants, the doctrine of assumption of risk should not be available. The situation cannot be clearer put than it is in the opinion

of the Circuit Court of Appeals in this case, page 424 (R. 76):

> "It is significant that Congress made no provision in the amendment with respect to the other risks to which railroad workers are exposed, namely, the ordinary risks inherent in railroading despite the use of the required safety appliances and the exercise of due care by a carrier for the protection of its men. The amendment speaks only of injuries resulting from the carrier's negligence, *and does not attempt to raise the standard of care required of a carrier* with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger. The omission is especially noticeable in view of the pains which Congress has taken from time to time in the passage of statutes for the protection of railroad employees. See the Safety Appliance Acts, 45 U. S. C. A. Section 1-16." (Italics ours.)

Conclusion.

The absence of any negligence by respondent proximately causing decedent's death has been established, not only by the verdict and judgment for respondent which was affirmed by the court below, but, also, by the substantially undisputed evidence in the record, coming from petitioner's own witnesses, as we have pointed out in the first part of this brief. If there is no substantial evidence of negligence in the record, the respondent cannot be held liable for decedent's unfortunate death, since it is elementary law that proof of negligence is essential to establish liability under the Federal Employers' Liability Act in cases where the Safety Appliance Act are not involved. The question of respondent's liability under the recent amendment to the Federal Employers' Liability Act abolishing the defense of assumption of risk of injury or death arising from the carrier's negligence, which was put into

the case by the petitioner and commented on by the court below, is, therefore, not properly in the case; unless at least petitioner can establish that the purpose and effect of the amendment was to establish new duties and obligations by the carrier to its employees which did not exist when the amendment was adopted. Respondent has attempted to show in the second part of this brief that this was neither the purpose, nor the effect of the amendment. Both the legislative history of the amendment and the specific language of the amending and amended statutes clearly negatives such idea.

Respondent, therefore, submits that the petition herein should be denied.

Respectfully submitted,

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August 31, 1942.